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July 21, 2009

Via E-Mail/Regular Mail
Phillip A. Olaya, Esq.
Federal Election Commission
999 E. Street, NW
Washington, D. C. 20463

RE: MUR 5818
Matter of Fieger, Fieger, Kenney, Johnson and Giroux, P. C., et al
Our File No. 3959.253

Dear Mr. Olaya,

Enclosed please find Respondents' Supplemental Brief Following Probable Cause Hearing of July 14, 2009.

Thank you for your attention to this matter.

Very truly yours,

FIEGER, FIEGER, KENNEY, JOHNSON
& GIROUX, P.C.

Michael R. Dezsi

MRD/vgb
Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Fieger, Fieger, Kenney, Johnson & Giroux, P.C.	)	
	)	MUR 5818
Geoffrey N. Fieger	)	
	)	
Vernon R. Johnson	)	

RESPONDENTS' SUPPLEMENTAL BRIEF FOLLOWING PROBABLE CAUSE HEARING OF JULY 14, 2009

On July 14, 2009, Respondents' undersigned counsel appeared before this Commission for a probable cause hearing. During the hearing, the undersigned counsel indicated to the Commission that the prosecution in the *Fieger* criminal case openly acknowledged that it did not have a single written case to support its theory that § 441f prohibits reimbursement. The undersigned further advised the Commission that instead the prosecution relied upon an FEC advisory opinion. Commissioner Petersen then asked the undersigned counsel at what point, in the *Fieger* case, did the prosecution make such representations. Respondents' respectfully submit this supplemental brief in response to Commissioner Petersen's question.

During the *Fieger* proceedings, the prosecution filed its Response to Defendant's Motion in Limine, Case No. 07-20414, Docket No. 206 (filed on March 10, 2008)(E.D. Mich.). In their brief, the prosecution asserted that

> There is nothing in the statute [§ 441f] which indicates that it is restricted to contributions made using the names of "the dead, fictitious, or names randomly gathered from the phone book. Rather, [§ 441f] applies to *any* contribution made in the name of another, no matter the route by which the contribution is made.

(United States Response to Defendants' Motion in Limine, pg. 3). The prosecution went on to claim, without any legal citation, that "courts and the FEC have long accepted that it does." *Id.* at 4 (citing to the FEC Advisory Opinion 1996-33 as its sole basis that § 441f criminalizes the reimbursement of campaign contributions including those made by adult children, parents, and non-working spouses).[1]

The prosecution then admitted that "[w]e are not aware of any federal court opinion which has addressed defendants' claim that section 441f does not [prohibit reimbursement]." The prosecution further admitted that "in the prosecutions under section 441f, the courts have simply accepted that the statute prohibits reimbursed contributions." *Id.* at 6 (internal citations omitted).

In short, the prosecution first turned upside down the rules of statutory construction by claiming that Respondents could not disprove their concocted theory of 441f so the prosecution must be right. Next, the government claimed, without any support (other than an FEC Advisory Opinion) that the courts and FEC have "long accepted" their overreaching theory of the law. Finally, the prosecution acknowledged that they were "not aware of any federal court opinion" addressing the issue. The Justice Department's specious analysis should serve well as an example to this Commission that this matter, like the Justice Department's criminal case, rests on a sinkhole. Or, like the prosecution admitted, until now,

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[1] Similar to the *Flieger* case, the Justice Department also relied on FEC Advisory Opinion 1996-33 in the *O'Donnell* case, an argument that the *O'Donnell* Court flatly (and correctly) rejected given that the FEC's regulations and advisory opinion in question substantially expand the ambit of the statutory prohibition contained in § 441f. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)(holding that an agency has the jurisdiction to pass regulations only to the extent that such regulations are consistent with the agency's statutory basis).

the "courts have simply accepted that the statute prohibits reimbursed contributions." *Id.* at 6. Respectfully, it seems that the Justice Department and the Commission should proceed on more than assumptions and attempts to expand the statutory plain language before launching into protracted, multi-million dollar trials aimed at trampling First Amendment rights.

During the probable cause hearing, the Commission also inquired as to Respondents' position as to the cases of *Federal Election Commission v. Williams*, Case No. 93-6321 (C.D. Ca. 1995)(unpublished) and *Federal Election Commission v. Weinsten*, 462 F. Supp. 243 (S.D. N.Y. 1978). Respectfully, Respondents assert that neither of those cases illuminate the question before this Commission.

In *Williams*, the district court issued a short, perfunctory order (without opinion). In a single sentence, the district court summarily concluded that "Defendant's conduct in either advancing or reimbursing the $1,000 to the 22 individuals violates the prohibition of making contributions [] in another person's name." Unlike the *O'Donnell* opinion, there is no legal authority, discussion, or analysis following the *Williams* Court's summary conclusion.

Based on this single sentence from the *Williams* order, it is impossible to discern how the parties and/or the court framed the legal issue, how the court reached its conclusion, or whether it ever engaged in an analysis of statutory construction based on the language of the statute. Instead, it appears that the district court simply 'accepted' the government's theory that 441f prohibits reimbursement (although the statute does not, at all, refer to reimbursement). Because the *Williams* order contains nothing more than a one-sentence, conclusory opinion, its jurisprudential value is dubious, to say the least.

The *Weinsten* opinion, on the other hand, is easily distinguishable because it did not address, at all, whether § 441f prohibits reimbursement. Instead, defendant claimed that the statute was unconstitutionally vague. Unlike the instant question posed to this Commission, a void-for-vagueness challenge asks whether the statute has a discernible meaning such that persons "of common intelligence" know what is prohibited. That is not the question being asked in this matter relevant to § 441f.

Here, Respondents claim that the statute in question, § 441f, has a definite and discernible prohibition; that is, that an individual cannot contribute money to a federal candidate in the names of others, including the dead, the fictitious, or names randomly gathered from the phone book. Respondents assert that § 441f has a definite and discernible meaning and thus there is no need to engage in a void-for-vagueness analysis as contained in the *Weinsten* opinion.

To the extent that the *Weinsten* Court *implicitly* concluded that reimbursement was prohibited under § 441f, there is no analysis or discussion of the issue, and so, like the *Williams* order, serves little usefulness to the issue before this Court. The General Counsel has also indicated that there are a number of other cases to support its position. The cases referred to by the Commission's General Counsel are unpublished and are not found in LEXIS. However, it seems that if those cases do indeed offer a substantive discussion of the issue, they would have heretofore been cited as such.

Given that the *Williams* and *Weinsten* cases offer no discussion or analysis as to the scope of 441f, they are inapposite to this matter. This leaves, as the undersigned counsel represented to the Commission, *only* the *O'Donnell* decision which squarely addresses the

issue in favor of Respondents.

If the Commission (and the Justice Department) wishes to seek expansion of the campaign finance law, including the prohibitions imposed by § 441f, it should lobby congress to change the law. However, neither the Commission nor the Justice Department can change the law unilaterally by indictments, Advisory Opinions, or other administrative regulations. This is no different than if congress passed a law that said you cannot turn right on a red light. The Commission cannot then pass regulations expanding upon the no-turn-on-red prohibition to also prohibit no turn on yellow.

Respectfully, Respondents request that this Commission examine the legal precedent discussed herein before deciding to embark on yet another multi-million dollar legal proceeding based solely upon an attempt to write into the law prohibitions not contained within the clear and unambiguous statutory language. Respondents have at all times acted within the bounds of the law. Apparently, there are some who wish to re-write the law by way of criminal and civil enforcement proceedings instead of congressional action. Sometimes such proceedings amount to nothing more than an abuse of power. Let this not be another.

Respectfully submitted,
FIEGER, FIEGER, KENNEY & JOHNSON & GIROUX, P.C.

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